STATE OF MICHIGAN

IN THE COURT OF APPEALS

IN RE P.M.,

Minor.

LC File No. 08-103-NA
COA No. 291874
Supreme Court No.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellant,

V

SHAE MULLINS,

Respondent-Appellee.

140983

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APPELLEE/RESPONDENT'S RESPONSE TO APPELLANT/PETITIONER'S APPLICATION FOR LEAVE

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondent DID NOT subject her three-year-old daughter to multiple sexual abuse examinations by various doctors over the course of nine months, despite the absence of substantial evidence of abuse. There was NOT evidence that she did this to disrupt the father's relationship with the girl, and that the examinations DID NOT carry the potential to harm the girl emotionally. The Court of Appeals DID NOT err in holding that the family court's decision to take jurisdiction over the child was clearly erroneous.

The Court of Appeals answers: "Yes."

Appellant/Petitioner answers: "No."

Appellee/Respondent answers: "Yes."

COUNTER STATEMENT OF FACTS

Shae Mullins is Appellee/Respondent Mother of Pallas Mullins, DOB 1/5/06, and Louis Dominion, father of Pallas Mullins, originally was a Respondent in this matter pursuant to the original petition filed with the Trial Court on October 1, 2008 by the Berrien County Department of Human Services. Mr. Dominion subsequently was removed as a Respondent pursuant to the Amended Supplemental Petition dated November 17, 2008 by the Van Buren County Department of Human Services. Further, the Berrien County Department of Human Services removed itself from this matter based on a conflict of interest regarding Louis Dominion, father. The Berrien County Department of Human Services was involved in the prior investigations of February 2008 and May of 2008 where there was no substantiations and no apparent conflict of interest, yet removed themselves upon filing of this Petition.

The Petition dated and filed on October 1, 2008 alleged that the minor child should come within the jurisdiction of the Trial Court pursuant to MCL 712A.2(b)(1) and MCL 712A.2(b)(2), although those specific statutes were not cited in the Petition nor the subsequent petition dated November 17, 2008. A petition requesting that the court assume jurisdiction must set forth the charges against a parent with clarity and specificity. *In re Hatcher,* 443, Mich 426, 434 (1993) Specifically, the October 1, 2008 Petition alleged that "Pallas Mullins was examined by Dr. Frengell at the after hours clinic in South Haven." Further, that "Dr. Frengell's exam noted swelling and redness to the vaginal area and finger-like bruises to the right lower leg of Pallas Mullins. She believed the injuries

are from sexual abuse and that Pallas Mullins has been penetrated." The original petition also stated that Dr. Frengell and the after hours clinic staff "advised Ms. Mullins to have the child examined at the emergency room and Ms. Mullins refused." They also "advised Ms. Mullins to call the police . . . but she responded 'they would not do anything'."

The Amended Supplemental Petition dated November 17, 2008 added further allegations that "[t]he mother's psychological state interferes with her ability to provide proper care and custody to Pallas. She has presented Pallas for sexual abuse examination on nine occasions between February and September of 2008. The mother does not accept the findings of CPS and State Police investigations which did not substantiate Louis Dominion for sexual abuse of Pallas Mullins." Further, the Amended Supplemental Petition alleged that "[t]he mother is emotionally abusive to Pallas by attempting to estrange the father-daughter relationship." Finally, the Amended Supplemental Petition alleged that "[t]he mother lacks appropriate parenting skills."

History preceding the filing of a Petition:

Appellee/Respondent and Mr. Dominion had one child in common, and through the involvement of the Berrien County Family Court, the custody, parenting time and child support order was entered. There was testimony regarding Mr. Dominion's beliefs and opinions about Appellee/Respondent and how she reacted to medical issues/situations. This information was provided by Mr. Dominion to the Van Buren County Children Protective Service Worker, but nothing was verified by that worker. She simply took Mr. Dominion's word. Teresa French did state that she never spoke

with Appellee/Respondent regarding the number of doctors' appointments because they were well documented. (2/20/09 Tr, Vol I, Part C, p 65, ln 21-25) Those documented appointments reference from the period of February 2008 through October of 2008. No other medical records were submitted at the trial proceedings. Appellant/Petitioner wants this Court to assume they were to someone, but certainly not to the Department of Human Services or to the trial court as the exhibits will show. Appellant/Petitioner assumes facts not in evidence by giving a rendition of what occurred prior to February of 2008, adding in a lot of presumptions on page 2 of the Application. Further, Appellant/Petitioner cites a portion of the transcript (2/20/09 Tr, Vol I, Part A, p 27) to garner support for these assumptions. To state that portion of the transcript accurately,

> "Q: In terms of during that time between their final break-up and you becoming involved, did the mother give you any description about whether or not Pallas was visiting with her father or what was going on in terms of Pallas' contact with her father"?
>
> A: Well, she described she was opposed to the father having unsupervised contacts, that at the initiation of the Friend of the Court involvement she expressed her concerns. They had to follow court orders, with Mr. Dominion submitting to drug screens, that they participated in therapy with Mitzi Kalin to make – to observe some parenting time between father and Pallas. Even though all of those

requirements were met she was still expressing concern, feeling that Mr. Dominion had somehow evaded being caught with substances. And she was – she was not satisfied with the opinion that Ms. Kalin had come to, that Pallas was ready for unsupervised visits. But because she had to follow the court order, she went along with it." (2/20/09 Tr, Vol I, Part A, p 27)

In February of 2008, Mr. Dominion began his unsupervised parenting time with Pallas Mullins; specifically he received alternate weekends from Friday through Sunday and every Wednesday evening. Subsequent to the child returning from her first visit to the mother's care, the minor child appeared to be ill: vomiting, diarrhea, and complaining of a possible headache. The following day, on February 11, 2008, Appellee/Respondent brought the minor child to the South Haven Community Hospital Urgent Care, the same location as her primary provider (Dr. Small) at Shoreline Family Care. Dr. Karen Jansen, who was not the child's primary provider on that date, assisted with the exam on February 11, 2008 and did a follow-up evaluation of the child on February 12, 2008. Pursuant to the February 11, 2008 evaluation, a 3200 Children Protective Services Form was filed with Berrien County Children Protective Services by the doctor stating that "child had a swollen labia . . . small fissure left prox labia major . . . faint bruising noted . . . suspicious find of genital trauma." (2/11/08, Exhibit 15 at the Trial Court) The follow-up evaluation on February 12, 2008 indicated that "Pt activity level has increased since being at the Dr. office", which logically would

have been the February 11, 2008 visit. (2/12/08, Exhibit 15 at the Trial Court) An investigation ensued by the Berrien County Children Protective Services as well as the Michigan State Police, and the allegations were unsubstantiated with no further action. As part of the investigation, Appellee/Respondent was directed to bring the minor child to the Kalamazoo Center for Medical Studies for an evaluation by Dr. Colette Gunhurst on February 14, 2008. During the interim of the investigation, father's parenting time was voluntarily supervised at the Department of Human Services, none of which he exercised.

On March 23, 2008, following another unsupervised weekend with the father, the minor child returned to Appellee/Respondent with a rash to the diaper area and redness in the vaginal area. The mother, while visiting family friends in Holland, Michigan for the holidays, consulted a family friend as to whether the "irritated" area required a medical evaluation. Given the concerns, Appellee/Respondent took the minor child to Zeeland Community Hospital for an evaluation. Appellant/Petitioner claims that Appellee/Respondent "told French that she went to Zeeland because she had a family member who was a nurse there and 'they were visiting'. Appellant mischaracterizes the transcript when in fact it actually states the following:

> "Q: Did you ever talk to the mother about why she went to another hospital instead of going back to her own physician?
>
> "A: I did not speak to her about it because that was documented in the previous investigations, her reason that she gave.

"Q: And what was the reason that she gave?

"A. That she had a family member that was a nurse, and they were visiting, so she took her to that – took her to visit that family member to get the opinion. And then that was the local hospital." (2/20/09 Tr, Vol I, Part C, p 58-59, ln 16-25, 1)

Dr. Johnson at the Zeeland Community Hospital found that "this redness can be from a diaper dermatitis if she had not been changed much over the weekend or it could even be from a yeast infection with the satellite lesions." (3/23/08, Exhibit 15) Nothing resulted from this matter, but Appellee/Respondent did bring the minor child for a follow-up visit at South Haven Community Hospital on March 24, 2008. No genital exam was performed pursuant to review of the records by Dr. Simms. (3/25/09 Tr, p 67, ln 12-14) Appellee/Respondent then did another follow-up visit with her new pediatrician, Dr. Karen Jansen, on March 25, 2008. Appellant/Petitioner states that "a referral was made to CPS (Shoreline Family Care Physician Record, 3/25/08; Tr IV, 67-68). No where in the transcript does Dr. Simms state that a referral was made to CPS by the treating physician on March 25, 2008. In fact what is accurate is that the physician from Zeeland Community Hospital contacted Children Protective Services in Ottawa County and then was redirected to Berrien County Children Protective Services. (3/23/08, Exhibit 15)

On May 4, 2008, the child returned from a weekend parenting time with the father, and again she presented with redness in her genital area. Appellee/Respondent brought the minor child to Bronson Methodist Hospital in the hopes of seeing Dr. Colette

Gunhurst, the specialist utilized by the Berrien County Department of Human Services. (5/4/08, Exhibit 15) Appellee/Respondent reported that the minor "child became very emotionally upset during a diaper change." A limited evaluation of the external genitalia was performed which noted "some very faint erythema within approximately 4-5 mm of the edge of the labia." Bronson Methodist Hospital completed a 3200 Child Protective Services Form.1 Ms. Mullins then did her follow-up appointment with her new pediatrician, Dr. Jansen, on May 5, 2008.

Dr. Stephen Guertin provided a summary dated July 16, 2008 (Exhibit 13) which was admitted by the Trial Court contrary to Appellee/Respondent's objections.2 The Trial Court's rationale for allowing the admittance of hearsay evidence was "I think it is helpful to me to review what it is that she used in helping to formulate her opinion." (3/9/09 Tr, p 47, ln 7-9) Further, the exhibit was lacking in complete information, specifically that Dr. Guertin did not review nor reference the first medical examination of February 11, 2008. Therefore, there is no possible way to determine if he had erroneous, preconceived notions regarding this matter, given that

1 No where in the medical records from Bronson Methodist Hospital (5/4/08, Exhibit 15 at Trial Court) does it state that the doctor and the nurse "made it clear to respondent that redness in the diaper area was not necessarily caused by sexual abuse (Exhibit 13, Guertin letter)." So how can Appellant/Petitioner and Dr. Guertin assumes these facts? Here is yet another reason Exhibit 13 should not have been admitted by the Trial Court as well as Appellant/Petitioner's inability to provide the actual facts in this case.

2 Appellant/Petitioner erroneously states that Exhibit 13 "was used by the court and parties not only for Guertin's own conclusions after he reviewed medical records, but for interpretation and handwriting deciphering of those records." No where in the transcripts does it indicate the purpose for this admission other than under the basis that a witness, Robin Zollar, used this document in her family therapy assessment. Further, Dr. Guertin failed to even acknowledge or reference the February 11, 2008 medical records which was the first occasion when the child saw Dr. Jansen, when the child was "crying" and "fights". (2/11/08, Exhibit 15)

fact that he cites the inaccuracy of Appellee/Respondent Mother's statements, although they were statements related to the February 11, 2008 medical visit not the February 12, 2008 medical record he referenced. Clearly, hearsay evidence is not admissible under any exception contrary to the Trial Court's belief.

Finally, on September 21, 2008, when the minor child was returned after a weekend parenting time with the father, the child presented with redness and swelling in the vaginal area. Appellee/Respondent brought the minor child to the South Haven Community Hospital Urgent Care Clinic, and the child was examined by Dr. Frengell. Dr. Frengell's findings were that the "suspect sexual abuse. Looks like she has been penetrated introitus . . . clitoris enlarged red. Bruising on both lips (sic), a set of bruise marks on right leg (sic) that fits the pattern of four fingers." Based on this evaluation, Berrien County Children Protective Services was contacted by the doctor via a 3200 Children Protective Services Form. Appellee/Respondent did a follow-up appointment with her pediatrician on September 22, 2008 at Shoreline Family Care.

Involvement at the Trial Court:

On October 1, 2008, following the filing of the original Petition, Pallas Mullins was removed from the care of her mother and placed in the care and custody of the Department of Human Services. On October 3, 2008, the child was examined by Dr. Colette Gunhurst, thirteen (13) days after the initial examination. There were no findings at that time. Further, the minor child underwent an interview at the Children's Assessment Center on October 3, 2008. (Exhibit 3) The conclusions by

Barbara Welke, LMSW, was that "Pallas Mullins stated her father 'Hurt my butt'." This information arose via forensic questioning by Ms. Welke. Ms. Welke inquired if "there was anyone that hurts her." When Pallas responded "Yeah. Mommy doesn't, only daddy." When asked how her daddy hurt her, she responded "He hurt my butt." When prodded further, she stated "He squished it." Ms. Welke then followed up with additional questioning regarding who hurt her butt. (Exhibit 3) Ms. Welke concluded that "this interview was inconclusive regarding allegations of sexual contact by Louis Dominion."

The Petition was authorized on November 20, 2008. After authorization of the Petition, the Referee for the Berrien County Family Court in the Order dated November 21, 2008 stated that "The child is released to the respondent/legal father, Louis Dominion upon the recommendation of the Family Reunification Program under the supervision of the Department of Human Services." The jurisdictional trial was scheduled to begin on January 28, 2009.

Fifteen (15) exhibits were admitted and ten (10) witnesses testified over the course of the five (5) days of trial: February 20, 2009; March 2, 2009; March 9, 2009; March 20, 2009; March 27, 2009; and April 13, 2009 when the Trial Court rendered its findings.

The Trial Court stated that "I'm asked to decide whether the evidence produced to show there is a statutory basis for jurisdiction here exists outweighs the evidence that the statutory ground does not exist." (4/13/09 Tr, p 5, ln 13-16) MCR 3.972(C)(1) states:

"Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of the evidence apply at the trial . . " The standard jury instruction regarding the definition of preponderance of the evidence is that evidence that a statutory ground alleged in the petition is true outweighs the evidence that that statutory ground is not true.

COUNTER ARGUMENT

Respondent DID NOT subject her three-year-old daughter to multiple sexual abuse examinations by various doctors over the course of nine months, despite the absence of substantial evidence of abuse. There was NOT evidence that she did this to disrupt the father's relationship with the girl, and that the examinations DID NOT carry the potential to harm the girl emotionally. The Court of Appeals DID NOT err in holding that the family court's decision to take jurisdiction over the child was clearly erroneous.

The Trial Court found "that jurisdiction over Pallas Mullins exists under MCL 712A.2(b)(1), in that the child was subjected to a substantial risk of harm to her mental well-being . . " (4/13/09 Tr, p 5, ln 17-20) The basis for this finding cited by the Trial Court was "potential harm here to the child's well-being . . ." (4/13/09 Tr, p 6, ln 1) The Trial Court found three components for this "potential harm", 1) "the alleged excessive numbers of medical - - and when I talk about medical, there were genital examinations, there were sexual abuse evaluations done of Pallas." (4/13/09 Tr, p 6, ln 2-5); 2) "the alleged efforts by the mother to alienate the child's affection from her father . . ." (4/13/09 Tr, p 6, ln 7-9); and 3) "the alleged infantization of Pallas by the mother." (4/13/09 Tr, p 6, ln 11-12)

The Trial Court erroneously found alleged excessive numbers of medical exams:

In reference to the first component of "potential harm", the Trial Court summarizes the contacts with the doctor that the minor child underwent. First, the Trial Court cites "mom's allegations of substance abuse by the father followed immediately after that first visit in February 2008." (4/13/09 Tr, p 7, ln 2-4) Throughout the trial proceedings and with the testimony of credible witnesses3, the focus of the medical evaluations and complaints to Children Protective Services by the mandatory reporters referenced suspicion of sexual abuse. Further, all complaints to Children Protective Services were initiated by the medical personnel based on their concerns/findings. Although Appellee/Respondent stated her concerns as well as the suspicions from prior exams, she never forced a report to be made to Children Protective Services. Rather she relied upon the expertise of the medical professionals.

Further, Detective Douglas Kill with the Michigan State Police testified when asked:

> "Q: So were you advised that Ms. Mullins had contacted Protective Services?"
>
> "A: I believe that came through the doctor's office." (2/20/09 Tr, Vol I, Part C, p 18, ln 9-11)

In regards to the March 23, 2008 examination at Zeeland Community Hospital, the Trial Court stated in its findings that "[y]et it appears the trip to Zeeland was basically

orchestrated by Shae Mullins because she had a family member there who worked in the Zeeland Hospital.4 I can only speculate to think that perhaps she believed that she would receive a more receptive audience in that location." (4/13/09 Tr, p 9, ln 23-25 and p 10, ln 1-3) It is not the Trial Court's duty to "speculate" as to facts not in evidence, and replace its own thoughts or facts into a case to make a final determination. Yet this is what the Trial Court did.

There were a total of nine visits referenced throughout the trial proceedings in which Appellee/Respondent brought the minor child to see a medical professional not at the direction of the Department of Human Services. Pursuant to Teresa French's testimony "[f]ive of the appointments were initiated for a sexual abuse allegation. And each time the child was presented to the ER doc, they always recommend follow-up by the pediatrician. So four of those appointments were follow-up by the regular ped." (2/20/09 Tr, Vol I, Part C, p 56, ln 15-19) With respect to the four appointments, Appellee/Respondent clearly was instructed to seek follow-up care with a family physician, yet the Trial Court faults her for that conduct as part of the excessive number of medical exams. Review of the original Petition filed on October 1, 2008 cites allegations that Appellee/Respondent did not follow medical instructions. Apparently, in the eyes of the Trial Court, Appellee/Respondent was in peril

3 The Trial Court never stated in its findings that it found any of the witnesses to be incredible and relied on various statements of all the witness.

4 None of the testimony or medical records reflects that Appellee/Respondent had a family member who worked at Zeeland Community Hospital. There only was reference to a family member being a nurse, but no indication of where she works. (2/20/09 Tr, Vol I, Part C, p 58-59, ln 16-25, 1) Clearly

regardless of any action she took because taking the child to a medically ordered follow-up was wrong, but failing to follow medical direction was wrong as well.

Further, with respect to eight of these medical appointments, Dr. Elizabeth Simms, who reviewed the medical records, stated that "[a]n examination of the child's genital area was done. They did not do a sexual exam into the vagina, which is a canal opening into the body, but a - - external exam was done." (3/20/09 Tr, p 64, ln 5-8) Further, Dr. Simms testified that one of the examinations referenced by the Department of Human Services as a genital exam on March 24, 2008 at the South Haven Emergency Department does not reflect a genital examination discernable from the medical record. (3/20/09 Tr, p 67, ln 12-14) Clearly, the Trial Court mischaracterizes the exams in its findings on April 13, 2009 when stating as the first component ". . . there were sexual abuse evaluations done of Pallas." (4/13/09 Tr, p 6, ln 4-5)

Finally, Dr. Simms testified that ". . . I am not making an assumption as to the cause of this child's redness. I have stated that redness in young girls is not an uncommon finding, that it's found equally in abused and non-abused children, that it can be related to poor hygiene." (3/20/09 Tr, p 91, ln 23-25 and p 92, ln 1-2) Further Dr. Simms testified that: "So a definitive finding that this child, excuse me, has not been sexually abused, I have never made that statement." (3/20/09 Tr, p 93, ln 20-22) Dr. Simms' findings were summarized in a letter dated November 18, 2009 which was admitted by the Trial Court (Exhibit 15). She testified that: "It was my concern that we

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the Trial Court erroneously arrived at this conclusion.

were approaching a form of medical abuse with the persistence of the patient's mother that . . ." (3/20/09 Tr, p 82, ln 5-7)

A therapist utilized by the Kalamazoo County Department of Human Services, Mary Baggerman, counseled Appellee/Respondent and the child prior to removal. She testified that ". . . the medical reports that I reviewed indicated that there was some cause for concern on those emergency room visits. And, you know, I'm not an expert on the physical findings in a sexual abuse case. I don't think Shae is either. So when she saw injuries on her child that she thought might be consistent with a sexual abuse injury, it was certainly my recommendation that she seek medical help on that." (3/2/09 Tr, p 76, ln 8-16)

Yet the Trial Court ignored this testimony in its entirety, ignored what "professionals" advised Appellee/Respondent to do in a difficult situation, and it utilized the "potential" as a basis to obtain jurisdiction under MCL 712A.2(b)(1) by way of "anticipatory" substantial risk, which is not how the statute reads.

Finally, the Trial Court stated in its findings that "both the Children's Assessment Center and Robin Zollar, there was not any evidence to support the claims that Pallas was ever sexually abused by anyone." (4/13/09 Tr, p 13, ln 8-11) The Trial Court mischaracterized Exhibit 3 from the Children's Assessment Center. Barbara Welke, LMSW, clearly stated in her conclusions that "Pallas Mullins stated her father

'Hurt my butt'."5 Further, "this interview was inconclusive regarding allegations of sexual contact by Louis Dominion." The Trial Court attempts to equate the term "inconclusive" with "no evidence" which is a clear abuse of discretion and outside of the facts presented.

The Trial Court erroneously found that Appellee/Respondent attempted to alienate the child from the father:

The second component found for potential harm was the "alleged efforts by the mother to alienate the child's affection from her father . . ." (4/13/09 Tr, p 6, ln 7-9) The Trial Court referenced the father's visits "were interrupted again by Children's Protective Services and State Police Investigations until the first weekend in May 2008. And following that weekend visitation the father's parenting time was again interrupted between Mr. Dominion and his daughter, Pallas." (4/13/09 Tr, p 7, ln 9-14) The Trial Court imputes facts not in evidence yet the only mention of voluntary suspension of the father's visits was when Teresa French, Petitioner, testified "[t]hat would have occurred in March when the father had resumed visitation with his daughter, during - - which occurred during the first investigation." (2/20/09 Tr, Vol I, Part B, p 31, ln 7-9)

The Trial Court further stated in this vein that "while Pallas did make statements to suggest that her father was, quote, yucky and mean, and that, quote,

5 Appellant/Petitioner claims "Pallas never said to anyone – doctor, psychologist, parent, foster parent or other – that any sexual abuse occurred." (p 11 of Application for Leave) What was Ms. Welke? The child clearly stated her father hurt her butt. To assume it was not sexual in nature is taking a huge

mommy said he doesn't love me. . . those statements clearly dissipated after the child had more interactions with her father." (4/13/09 Tr, p 13, ln 12-18) The Trial Court's reliance that the statements dissipated is also based on the fact that the child was now placed with her father, and clearly the father would not report these remarks. Did the Trial Court recognize that clear and blatantly obvious fact? No it did not. The Trial Court also relied on the "expertise" of the counselor utilized by Berrien County Department of Human Services, Robin Zollar. Ms. Zollar testified that ". . . there was nothing that was inconsistent with her statements and the information that I had obtained regarding physicals that had been done." (2/20/09 Tr, Vol I, Part B, p 46, ln 6-8) During Ms. Zollar's testimony, an incident came out where the father got upset while changing the child's diaper and finding extreme redness in the genital area. Ms. Zollar's assessment of the father's reaction was "I think most - - well, having seen it myself, I think it was a concern. And I think most parents in looking at that would probably be concerned." (3/9/09 Tr, p 9, ln 1-3) Yet Ms. Zollar, Department of Human Services and ultimately the Trial Court disparage Appellee/Respondent's actions when getting upset and taking her child in for medical review and treatment under the same circumstance. Clearly, these individuals readily hold Appellee/Respondent to a higher standard while also justifying and approving of the father's reaction.

Appellant/Petitioner argues that Appellee/Respondent was not forthcoming with

leap.

information, one area revolving around her housing. Ms. Zollar was aware of Appellee/Respondent rehabbing a home in the Battle Creek area. (2/20/09 Tr, Vol I, Part B, p 56, ln 13-25 and p 57, ln 1-16) Yet when the father left the State of Michigan with the minor child, Ms. Zollar was not advised of the same. Clearly, her concern or depth of testimony is not the same, but this is excusable on behalf of the father, just not with Appellee/Petitioner. (3/9/09 Tr, p 31, ln 17-25) Another area Appellant/Petitioner claims Appellee/Respondent was not forthcoming was in regards to testimony by Detective Kill that Appellee/Respondent "had not received any money from Dominion before the court ordered child support." (p 10, Application for Leave) Specifically, Detective Kill testified:

> "Q: . . . Ms. Mullins said that prior to this case being initiated in terms of custody she hadn't received money from Mr. Dominion?
>
> "A: She had not.
>
> "Q: Had not received child support and child care.
>
> "A: She told me she had not received money from Lou Dominion.
>
> "Q: For child support and child care?
>
> "A: Yes. . .
>
> "Q: Did he also provide you or did you look into the fact that these monies were reported to IRS as income to her?
>
> "A: I did not look into any IRS statements as well." (2/20/09 Tr, Vol I, Part C, p 28, ln 5-18)

The Trial Court went further to state that Det. Kill was operating under some assumptions whether these monies were child support or not. It could have actually been for a new car she bought. (2/20/10 Tr, Vol I, Part C, p 29, ln 18-23) Appellant/Petitioner failed to mention this portion of the hearing in their attempt to further wrongfully disparage Appellee/Respondent.

The Trial Court erroneously found the alleged infantization of the child by Appellee:

The third component of "potential" harm was the alleged infantization of Pallas Mullins by Appellee/Respondent. Once again, the concern of infantization was brought out by Robin Zollar, the Department of Human Services counselor. During the testimony of Robin Zollar, she focused on the fact that the child "was still on a bottle. She was still using a pacifier. She was still in diapers. She had been sleeping in a crib until she went into foster care. And she was still being given on visits what they call toddler - - basically they're toddler foods." (2/20/09 Tr, Vol I, Part B, p 38, ln 4-8) It should be remembered that Pallas Mullins was approximately 2 ½ years of age at the time of the filing in this matter.

Although she expressed the aforementioned issues, Ms. Zollar further testified that Appellee/Respondent had excellent parenting skills.

"Q: Now, when you met with Shae initially did you praise her for her parenting skills; tell her she had excellent parenting skills?

"A: I did.

"Q: And was that statement accurate that you told her?

"A: Yes." (3/9/09 Tr, p 42, ln 16-21)

Mary Baggerman, a counselor with Treatment Consultation Services and counselor for Kalamazoo County Department of Human Services, addressed the child's development.

"Q: Were there concerns that she brought to you with respect to Pallas' continued development as well?

"A: Yeah. We had a few conversations - - Yes. We had a few conversations that referred to that. One of Shae's concerns was that she had worked on potty training with her through that summer and that she thought that she was having some regression with the potty training. . . So my advice to her was to just kind of back off on that and to not push it with her and to just kind of wait until she decides to do it on her own." (3/2/09 Tr, p 46, ln 24-25 and p 47, ln 1-25)

Ms. Baggerman also addressed that the child's use of a bottle and not being toilet trained was not concerning to her.

"Q: Okay. Do you ever have concerns that the parents are trying to retard the development of the child in order to keep them a baby?

"A: I didn't have that concern with Shae." (3/2/09 Tr, p 48, ln 15-18)

Dr. Sharon Hobbs, psychologist who performed an evaluation on Appellee/Respondent, also testified. She addressed the concept of infantization portrayed

by the Department of Human Services and Robin Zollar.

"Q: Okay. And would you have concerns with respect to a child who's two, two and a half that wasn't out of diapers yet?

"A: Not particularly. I mean, that's why they make those big diapers. There are many reasons why children are in diapers. . .

"Q: Would you find it alarming if a child still used a bottle on occasion when they were two, two and a half years old?

"A: No. I wouldn't be disturbed but you surely want to start having them use the cup as much as possible. . .

"Q: Okay. And with respect to a child of that age sleeping in a crib or sleeping with their parent, is that alarming to you?

"A: Well, again, you say alarming, most parents about two, two and a half child out of a crib and into a regular daybed. . ." (3/9/09 Tr, p 120, ln 21-21; p 121, ln 1-25; and p 122, ln 1-4)

Given the testimony of two experts with respect to children, the Trial Court still relied on only the statements provided by Robin Zollar to make its findings. Although, the Trial Court characterized its findings as "over protection of the child may not be infantization as much as an effort to control the child and keep the child really to herself." (4/13/09 Tr, p 18, ln 10-12) Clearly the Trial Court leapt to a conclusion not supported by a sufficient basis and completely disregarded evidence presented to the contrary.

What also is important to note is Appellant/Petitioner's argument that the minor child was toilet trained within a few weeks of coming into foster care. (p 17, Application for Leave) Yet in Ms. Chaney's (foster mom) testimony, she actually stated the following:

> "Q: You said she was wearing diapers when she came?
>
> "A: Yes.
>
> "Q: And what – did you follow those instructions?
>
> "A: For the first couple of days, because I wanted her to kind of get settled in with us and more comfortable. Then we took her shopping. I bought her her own potty chair. She picked it out.
>
> And she may have had two to three accidents in the next day or two, but other than that she went straight to big girl underwear during the day and telling us when she had to go potty, for a couple of weeks or so Pull-Ups at night. . ." (2/20/09 Tr, Vol I, Part B, p 6, ln 7-18)

A 'few weeks', as characterized by Appellant/Petitioner certainly is different than a 'few days', which is what was testified by Ms. Chaney. What is interesting to note, on October 24, 2009, "Mr. Dominion was asked by the Foster Care staff if he would change Pallas' **diaper**?" (Exhibit 1) The child was removed from Appellee/Respondent's care and placed into the foster home on October 1, 2008. Twenty three (23) days later, she still wears diapers, contrary to the direct testimony of Ms. Chaney. Did the Trial Court address this apparent contradiction? It absolutely

did not and instead chose to overlook it.

Another interesting contradiction relates to whether the child slept in a crib or toddler bed. Ms. Chaney's testimony regarding this fact is as follows:

> "Q: Any sleeping instructions?
>
> "A: I had been told that she had been in a crib, which we – I tried the first night." (2/20/09 Tr, Vol I, Part B, p 4, ln 22-24)

These "instructions" came from the Department of Human Services. (2/20/09 Tr, Vol I, Part B, p 12, ln 19-20) But, in looking at Barbara Welke's report (Exhibit 3), when the child was asked "what her bed at mommy's house looks like" she stated "it was pink" and further clarified that "she slept in a 'big girl's bed'." (Exhibit 3) So did Ms. Welke and the child misstate the truth or did the Department of Human Services provide inaccurate information to the foster parent? No one knows, but to look at the Trial Court's findings, clearly the child and Ms. Welke were not forthright.

The Trial Court, in viewing that Appellee/Respondent wanted to "keep the child to herself" (4/13/09 Tr, p 17) failed to acknowledge the testimony of Robin Zollar commending the child's verbal skills; failed to acknowledge the testimony of Robin Zollar praising Appellee/Respondent's parenting skills; and failed to recognize that the fact that the child knew her colors and various identifying words for objects pursuant to Barbara Welke. Essentially, the Trial Court extrapolated what it wanted to arrive at the conclusion expressed on April 13, 2009. It did not take into account the contradictions presented by Appellant/Petitioner, and it did not take into account

credible, admissible evidence to the contrary.

CONCLUSIONS

The Trial Court was offered a plethora of evidence regarding possible sexual abuse of the minor child through medical records, evidence that Appellee/Respondent followed medical instructions regarding the physical needs of her child, followed the advice of therapeutic professionals regarding the correct course to take with this situation, and still the Trial Court ignored this evidence and took jurisdiction.

Additional evidence and concerns were offered to the Trial Court as well to explain the anxiety and trepidation the minor child felt towards the father, yet that evidence also was not taken into account during its findings. Detective Michael Smigielski testified as to his knowledge of Shae and Pallas Mullins. He also had the opportunity to observe an exchange in parenting time between the father and Appellee/Respondent. Detective Smigielski indicated that he felt the father was very inappropriate and aggressive with the child.

> "Q: And do you recall where the parenting time exchange took place?
>
> "A: Out in the front - - front driveway area, the porch. . .
>
> "Q: And what did you observe at that point with Pallas and Ms. Mullin's mother being on the front porch?
>
> "A: Pallas immediately started crying hysterically, so I was standing in the living room, so I stood there and watched. She was saying she didn't want to go with daddy. Kelly was trying to calm her down. Mr.

Dominion came up, got angry with Kelly, said some words to Kelly, not 100 percent sure what the words were. I was still - - I was in the house. Kelly was at the front door. . .

"Q: . . . But - - in terms of what Mr. Dominion stated.

"A: Something about it's all her damn fault to Kelly.

"Q: Was this in the presence of Pallas?

"A: Yes. Pallas was on the front porch by a chair.

"Q: And do you recall if his voice was raised or he was angry?

"A: He was yelling because I could hear him inside the house. . .

"Q: And what happened next?

"A: Kelly said something to him. And then he started up on the porch, snatched up Pallas pretty hard, put him - - put her over his shoulder and threw her in the car, said something else to Kelly and drove off.

"Q: You said snatched up, what did you mean by that?

"A: Grabbed her by the arm and pulled her up.

"Q: And what was Pallas' demeanor or appearance at that time?

"A: She was hysterical, crying, hysterical. . .

"Q: In your personal opinion what concerns did you have about this exchange?

"A: It was pretty aggressive. I think it was very inappropriate.

"Q: By who?

"A: Mr. Dominion." (3/27/09 Tr, p 13, ln 12-25; p 14, ln 1-25; p 15, ln 1-25; and p 16, ln 1)

Further, Detective Smigielski testified as to bruises he observed on the child after she was placed in her father's care by the Trial Court.

"A: - - the maternal grandmother's house. I think actually a couple of times I went to see my granddaughter there - - or my daughter there.

"Q: And this was after Pallas was taken from Shae's care?

"A: Correct

"Q: And did you make any observations of Pallas that cause you some concern?

"A: The second time I went there there was some - - there was a bruise that was on her leg that I noticed right off the bat.

"Q: Okay. How far were you from the child?

"A: Five feet.

"Q: What kind of bruise that would cause you alarm?

"A: It looked like finger marks.

"Q: Do you recall when this was?

"A: It was in the wintertime, probably several months ago, so three months ago maybe." (3/27/09 Tr, p 19, ln 4-20)

The anger by the father directed towards Appellee/Respondent also was noted by the Department of Human Services foster care worker, Kerrie Summerhill.

"Q: And in any of those four or five visits do you recall an incident where Mr. Dominion became upset with Ms. Mullins and her mother during the, for lack of a better term, exchange in parenting time, in terms of her parenting time ended with you and then it was his parenting time to follow?

"A: I do recall one incident that he did make remarks. I don't want to say it was necessarily towards Ms. Mullins' mother.

"Q: Okay.

"A: It was more towards Ms. Mullins.

"Q: Okay. And was Pallas in his arms at the time, do you know, so that she could - -

"A: Yes.

"Q: - - start his visit? So those remarks were made toward Ms. Mullins?

"A: Yes.

"Q: Do you recall what those remarks were?

"A: I don't recall the exact words, no.

"Q: Do you recall if they were positive remarks?

"A: I - - I probably wouldn't classify them as real positive, no." (3/20/09 Tr, p 111, ln 16-25 and p 112, ln 1-12)

Even given this additional information regarding the father's demeanor and attitude towards Appellee/Respondent and in the presence of the minor child, the Trial

Court found Appellee/Respondent's actions to be damaging to Pallas' mental well-being and attempts to destroy the father-daughter relationship. Could the father be causing damage to the relationship by his own actions as demonstrated during this matter? Absolutely, but the Trial Court ignored that information as well.

Clearly, the Trial Court's basis to take jurisdiction in this matter was an abuse of discretion. The Trial Court ignored the testimony and professional opinions of Dr. Sharon Hobbs and Mary Baggerman, two individuals with a vast amount of experience in child abuse/neglect matters, regarding the aspect of "coaching" and "infantization". The Trial Court chose to ignore the directives Appellee/Respondent received from medical professionals regarding follow-up examinations and the therapeutic advice offered by Mary Baggerman. The Trial Court chose to ignore that sexual abuse could not be ruled out per the testimony of Dr. Simms, but rather determined, on its own, that no sexual abuse occurred. The Trial Court chose to ignore the father's conduct, demeanor and action as a plausible rationale for the child's statements and the alienation the child felt towards the father.

The Trial Court did place significant weight on the testimony and suppositions found by Robin Zollar, and the hypothesis of Dr. Kitchen who relied on flawed materials. The Trial Court also admitted inadmissible evidence through Robin Zollar, believing that since she reviewed the materials it needed that information as well. There is no doubt that abuse of discretion occurred, in addition to the Trial Court placing its own opinions and assumptions in the final determination.

The standard of review for the Court of Appeals was to determine if there was an abuse of discretion by the Trial Court. *In re Scruggs,* 134 Mich App 617, 621-22 (1984) and *In re Ricks,* 167 Mich App 285, 295 (1984). Further, the Court of Appeals expounded on the standard by further stating that "upon reviewing the facts and law, incumbent upon this Court is to determine whether there was a sufficient basis for the trial court to assume jurisdiction." *In the matter of C.S., S.S., M.S. and B.S., Minors,* No. 235778 (Mich Court of Appeals September 20, 2002)

The Court of Appeals correctly overturned the Trial Court's finding for jurisdiction in this matter. Some of the evidence was mischaracterized and misconstrued by the Trial Court, as outlined in this Brief. Additionally, none of the medical professionals in this matter would deny the possibility of sexual abuse as testified by Det. Kill and Dr. Simms. But the Trial Court made its findings on the **possibility** that the minor child would be harmed in Appellee/Respondent's care. What happened to the possibility of sexual abuse? It was conveniently swept under the rug by the trier of fact.

The Court of Appeals also correctly points out that the concept of "doctor shopping" was determined from **mere speculation**. It further stated that "we do not find it appropriate to speculate or attribute a motivation for behavior that cannot be substantiated through actual evidence." *In re P.M., Minor,* COA No. 291874 (March 16, 2010)

Appellant/Petitioner focuses its attention on the dissenting opinion by the

Honorable Donald Owens. The dissent stated that "[t]he trial judge was in a far better position than we to evaluate the credibility of the witnesses who appeared before him and to determine the weight to be accorded to their testimony." *In re P.M., Minor*, COA No. 291874 (March 16, 2010) Yet the Trial Court did not express any concern or findings that any of the witnesses were not credible. It simply picked out the evidence (even if conflicting) that it wanted to use and ignored the rest. That is not what a trier of fact does.

The justice system requires that a case is heard by a fair and impartial panel, be it judge or jury. Fundamental fairness forms the core of due process analysis, and fundamental fairness is determined in a particular case by assessing the several interests that are at stake and the relevant precedent. *In re Brock,* 442, Mich 101, 11 (1993) This did not occur as evidenced by the testimony and evidence presented, and this matter was absent of compelling circumstance that threaten a child's safety and welfare. A miscarriage of justice unfortunately occurred in this matter, which not only affects Appellant/Respondent Mother, but more so the minor child, Pallas. Michigan law recognizes that parents are entitled and have the right to manage their children without state interference, absent compelling circumstances that threaten a child's safety and welfare. *Ryan v Ryan,* 260 Mich App 315, 333 (2004) The Trial Court acted on "potential" harm that it believed could occur, without any evidence to support this anticipatory conclusion.

REQUEST FOR RELIEF

The Court of Appeals correctly overturned the findings of the Trial Court in that the allegations were insufficient to render jurisdiction to the family court.

WHEREFORE, Appellee/Respondent, Shae Mullins, respectfully requests that this Honorable Court deny Appellant/Petitioner's Application For Leave to Appeal and affirm the findings of the Michigan Court of Appeals.

Dated: May 14, 2010

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